

BCM GHANA LTD VS ASHANTI GOLDFIELD

FACTS

The appellant had agreement with the respondent to carry out mining operations. The contract provides for adjustments called Rise-and-fall and the dispute resolutions of Rise and Fall is the matter of contentions now.

The agreement of the parties contained clause 3.25.1 which states that if any difference or dispute arises between the parties in relation to or in connections with this agreement, either party may by notice in writing to the other party call for the point of disagreement to be formally resolved by the parties. That the dispute must be resolved under twenty-eight days after a written submissions are received by parties.

Clause 3.25.2 of the arbitrations agreement also said that, if disputes are not resolved by mutual parties within the 28 days as stated in clause 3.25.1 disputes may be referred to arbitration.

3.25.5 further states that the decision of the parties shall be final and binding no party shall be entitled to commence or maintain any action until the dispute has been referred to accordance with the clause.

THE PLAINTIFF CASE

On the 3rd of July 2003, the appellant issued a writ against the respondent claiming: a declaration that the terms of this contract agreed upon and duly executed by the plaintiff and the defendant on 25/7/1997 and that the plaintiff is entitled to Rise and Fall claims as referred in clause 3.21

2. and that the defendant own past performance is estopped him from denying, rejecting to pay in full all Rise and Fall claims

3. An order compelling the defendant to pay in full all Rise and Fall claims

4. Interest at the current commercial claims

5. Cost including Solicitors fees

THE DEFENDANT CASE

The respondent entered a conditional appearance and moved the court for stay of proceeding pursuant to the arbitration clause in the contract. But the high court dismissed the applications, the

respondent successfully appealed to the court of appeal. And the appellant not be satisfied appealed to supreme court on the following grounds; that the court of appeal misconstrued the word “May” contained within the arbitral clause in the contract to mean “shall” and that he appellant bond by the arbitration as a condition precedent to court actions.

ISSUES:

Whether or not there is a dispute that falls within the remit of Arbitration agreement.

Whether or not stay of proceeding should be granted for a reference to Arbitration.

DECISION AND THE REASONING FOR THE ISSUES

An arbitration clause can only have such effect as its terms warrant, **Heyman V Darwin** states “the answer to the question whether a dispute falls within an arbitration clause in a contract must depend on; What the dispute is and whether the arbitration clause covers the disputes. And that any disputes which the arbitration clause covers involves both substantive and procedural considerations.

Hyman v Darwin further stressed that “An Arbitration clause is a written submission, agreed to by the parties to the contract and like other written submissions to arbitration must be construed according to its language and in the light of circumstance in which it is made.

It is obvious this instant case that the effect of clause 3.25.2 that parties supposed to resort to mutual conciliation as a precondition to to arbitration as contained in clause 3.25.2

In Kwaku Grunshue v The Republic (1997), Francois J.A delivering a judgement of the court of appeal addressed the need to observe preconditions of any event or action, that it must be observed that **sections 134** can only follow when **sections 133** have been complied with. *The same way clause 3.25.5 can only follow when clause 3.25.2* has been complied with.

Again the appellant clams that the court of appeal did not have any regard to clause 3.22.5 of the contract which provided that the appellant may exercise any other remedies open to it if the respondent default in the payment of Rise and falls claim and any remedy entails seeking legal redress in a court of competent Jurisdiction and that error by the judge had occasioned a substantial miscarriage of Justice.

The supreme court said the provisions of clause 3.22.5 of the contract do not say that the appellant can exercise any remedies free from what is stated in the Arbitration agreement.

The offer to settle the dispute was served on 28th December 2002. The notice was dated 17/01/2003. And Plaintiff writ was dated 8/7/2003. So the 28 days period allowed by the contract for the conciliation had way expired and since the respondent still disputed, the plaintiff claim of clauses 3.25.2 and 3.25.5 read together, mandatorily requires the disputes to be referred to arbitration.

The word “may” may be deemed to be “shall” by clauses 3.25.2 and 3.25.5 read together, on that basis second ground failed.

The last contention was that the court of appeal ignored the reliefs (i) and (ii) endorsed on the appellant writ of summons, which calls for interpretations of those provisions.

The supreme court believed the appellant contention that they raised issues of interpretation is farcical.

The supreme court said in court decisions of **In re Ghana private road transport union, Tetteh v. Esslifie** does not purport to lay down a general principle that whenever a legal construction arises from the term of contract containing an arbitration clause the same must be reserved for the court to interpret. Indeed, in **KHOURY n KHOURY (1962)** the court said that both questions of law and question of fact can be entertained by an arbitration and a court cannot therefore refuse a stay proceeding because the court is in a better position to adjudicate upon such matters.

Furthermore, that the question is not whether it will be more satisfactory that the case should proceed in court but whether there is sufficient reason why the matter should not be referred in accordance with the submission because in the sense, the person opposing the stay is seeking to get out of this contract that is why the need to refer the dispute to arbitration. To refuse stay on this ground would in effect neutralise the contract the parties have agreed upon.

The supreme court therefor granted the stay of proceeding and reference to arbitration.

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